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Docket No.

In the
SUPREME COURT OF THE UNITED STATES

BARBARA HILCHEY CARUSO, WIFE OF/AND
DAVID CARUSO
Petitioners

VERSUS

DR. GEORGE MORRIS
Respondent

ON PETITION FOR WRIT OF CERTIORARI
AND REVIEW THE RULING
OF THE FOURTH CIRCUIT COURT OF APPEALS
OF THE STATE OF LOUISIANA
NUMBER 2004-C-1554

ORIGINAL PETITION ON BEHALF OF PLAINTIFFS/ PETITIONERS

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ISSUES PRESENTED FOR REVIEW:

I. Whether David Caruso was deprived of a constitutionally protected interest in a cause of action for the wrongful death of his unborn child in violation of the Due Process Clauses of the 5th and 14th Amendments, in that the Court below failed to recognize his distinct claim separate and apart from the claim of his Co-Petitioner, Barbara Caruso.

II. Whether David Caruso was deprived of a constitutionally protected interest in a cause of action for malpractice against respondent, Dr. George Morris, for the death of his unborn child, in that the court below made findings inconsistent with the liberty interests protected by Louisiana's Medical Malpractice Act.

III. Whether Barbara Caruso was deprived of a constitutionally protected interest in a cause of action for the malpractice of Dr. Morris and the wrongful death of her unborn child in violation of the Due Process Clauses of the 5th and 14th Amendments, in that the court below made findings inconsistent with the liberty interests protected by Louisiana's Medical Malpractice Act.

THE SUPREME COURT OF

THE UNITED STATES OF AMERICA

BARBARA HILCHEY CARUSO, WIFE/OF AND
DAVID CARUSO

VERSUS

DR. GEORGE B. MORRIS

PARTIES TO THIS PROCEEDING

Petitioners

BARBARA HILCHEY CARUSO

DAVID CARUSO

Respondent

DR. GEORGE B. MORRIS

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Petitioner respectfully requests this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court for the State of Louisiana, denying Supervisory Writs from a judgment of the Fourth Circuit Court of Appeals for the State of Louisiana dismissing petitioners malpractice and wrongful death claims.

OPINIONS BELOW

This matter comes before this Honorable Court from the State of Louisiana, where the Civil District Court for the Parish of Orleans, Honorable Ethel Simms-Julien presiding, denied respondent's Exception of Prescription on or about August 2, 2004, and the Louisiana Fourth Circuit Court of Appeals reversed said judgment summarily, without the benefit of oral argument on or about September 29, 2004, thereby granting the Exception and dismissing the claims of your petitioners. Petitioners sought supervisory writs to review the Fourth Circuit's decision in the Louisiana Supreme Court, which writs were denied on January 28, 2005.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257 in that the denial of petitioner's writ by the Supreme Court of Louisiana amounts to a final judgment by the highest court of the state, and the question upon appeal is whether an action taken by a state court is repugnant to the Constitution of the United States in that such action violates petitioner's 5th and 14th amendment rights to Due Process.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law"

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioners, Barbara Hilchey Caruso and David Caruso, each of whom have a separate and independent claim for Wrongful Death filed a claim before the Medical Review Panel and then before the Civil District Court, Parish of Orleans, before the Honorable Ethel Simms-Julien. The defendant-physician filed an Exception of Prescription which Judge Julien denied on the basis that there were issues of fact and credibility yet to be resolved. These factual issues were presented in sworn affidavits by David Caruso and by Barbara Caruso, as well as in the deposition of Dr. Morris, who admitted giving the Carusos the explanation of an unpreventable maternal-fetal bleed. These issues largely concern whether Dr. Morris' explanation for the baby's death was wrong, or intentionally or unintentionally, misleading, and given that explanation, whether the Carusos ever had knowledge beyond knowing that there was a tragic event, or even a mere apprehension as to something going wrong.

The trial court, Honorable Ethel Simms-Julien, Judge, properly held, based upon all the evidence, that there was no showing that prescription had run. As to David Caruso, his affidavit, the only evidence before the court, clearly shows that he fully accepted Dr. Morris' explanation that the infant died from a fetal-maternal bleed, a rare and unpreventable syndrome. Only by happenstance did a physician, who was consulted as to possible future pregnancies, later advised Mr. And Mrs. Caruso that the baby died from a very preventable beta-strep infection. The Carusos were

advised, that had proper prophylactic care been provided prior to delivery, "You would have had a live baby."

Judge Julien correctly ruled that any delays were reasonable, particularly since Dr. Morris, Mrs. Caruso's trusted treating physician, had offered what seemed to be a very plausible explanation. (See Judgment of the Trial Court, attached hereto as Exhibit "4"). Moreover, Judge Julien correctly ruled that there were issues of fact and credibility yet to be resolved. This ruling was clearly in accord with the evidence and within the trial court's discretion, and defendants failed to meet their burden to show that the court's ruling was manifestly erroneous.

Repondent claimed that Barbara Caruso's obtaining the medical records was sufficient to start the running of prescription. This finding was in error both as to Barbara Caruso and David Caruso. As to respondent's claim regarding Barbara Caruso, it is clear that whatever knowledge she may have had cannot be imputed to David Caruso who has a separate claim for wrongful death. Secondly, as to both Mr. And Mrs. Caruso, the trial court followed, but the court of appeal ignored, the proper legal standard that the mere apprehension of a possibility of a claim, or the mere knowledge that something had tragically gone wrong, is not in itself sufficient to sustain a plea of prescription.

In this case, the facts were clearly to the contrary. The proof of the Carusos acceptance of Dr. Morris' explanation, and their continued belief in his expertise, was shown by the fact that Mrs. Caruso continued to treat with Dr. Morris, and even submitted to laparoscopic surgery under general anesthesia. This is certainly inconsistent with the appellate court's conclusion that Mrs. Caruso knew, at an earlier date, that there was possible malpractice.

Instead, the appellate court went outside of the record and substituted its suppositions for the evidence in the record. The trial court, on the other hand, properly based its ruling on the affidavits and other evidence in the record, not on hunches or feelings about

what might have been the state of knowledge of the plaintiffs. This court will see that the affidavits and other evidence clearly support Judge Julian's denial of the Exception of Prescription. (See Exhibit "4"). The court of appeal erred in summarily reversing the trial court's sound ruling based firmly on the factual evidence in the record and the applicable law. In the argument section of this brief, petitioners will present some of the applicable law, and petitioners submit that based on these facts, and the applicable law, this court should grant Writs and reverse the judgment of the appellate court and reinstate the judgment of the trial court, denying the Exception of Prescription.

After respondent, Dr. George Morris, filed Writs to the Court of Appeal, Fourth Circuit, which summarily, and without a hearing, reversed the judgment of Judge Ethel Simms-Julien without any showing of manifest error by the trial court, plaintiffs requested a re-hearing which was denied. Subsequently, petitioners filed Writs with the Louisiana Supreme Court, which writs were denied. Because of the court of appeal's summary reversal of the ruling of the trial court, and the Louisiana State Supreme Court's denial of Supervisory Writs, petitioners are obliged to seek a Writ of Certiorari with this Court and request that the Court review this matter, reverse the ruling of the court of appeal, and reinstate the ruling of the trial court, denying the Exception of Prescription, and allowing this claim to move forward in accord with fundamental Due Process principles.

B. Statement of the Facts Adduced at Hearing on Exception of Prescription

Barbara H. Caruso and her husband, David E. Caruso, Jr., suffered the loss of their son David, who was stillborn at term. The treating obstetrician, Dr. George Morris, explained to the grieving couple that the baby died from a maternal-fetal bleed, a rare, and essentially unforeseeable and unpreventable event. The parents fully accepted this explanation, and Barbara Caruso continued to treat with Dr. Morris through a later miscarriage and she even underwent

a laparoscopic surgery to rule out an ectopic pregnancy, under the care of Dr. Morris. It was only later by happenstance that a physician reviewing the records to evaluate chances for a future successful pregnancy called David Caruso and told him what was the shocking news; namely, that the baby had died from a Beta Strep infection and had Dr. Morris taken the proper precautions, the parents would have had a live, healthy baby.

ARGUMENT

A. The Fourth Circuit Court of Appeal for the State of Louisiana, in reversing the trial court, erred in dismissing a separate Wrongful Death claim of the father, David Caruso, based solely on defendant's allegations as to the possible knowledge of the mother, Barbara Caruso, and this was despite the only evidence as to David Caruso, being his own affidavit, which would require upholding the decision of the district court.

The Court of Appeal erred when it found that Barbara Caruso's request for medical records placed the Carusos on constructive notice that there was a potential claim for malpractice. However, even if the findings of the Court of Appeal were supported by the record, which the Carusos strenuously deny, the Court failed to state its reasons for concluding that this matter should be dismissed ***as to David Caruso***, when there is nothing in the record to suggest that he joined in the actions of Barbara Caruso when she requested the medical records in 1994. David Caruso's affidavit is clear that he did not know of any malpractice until he heard from Dr. Krane in 1996, and defendants have offered no evidence to the contrary. Specifically, there is no evidence in the record that David Caruso even knew the Barbara Caruso had requested the medical records. Thus, even if Barbara Caruso is found to have had constructive knowledge of the malpractice, which plaintiffs strenuously deny, there is nothing to suggest that David Caruso shared in that knowledge. Therefore, even if this Honorable Court finds that a request for medical records is enough to place Barbara

Caruso on constructive notice of the possible claim, thus holding that her claim had prescribed at the time of filing, this Court should REVERSE that part of the ruling finding David Caruso's claims prescribed.

A "civil action" is defined as "a demand for the enforcement of a legal right." LSA-C.C.P. art. 421. A "cause of action," on the other hand, is defined as "the operative facts which give rise to the plaintiff's right to judicially assert the action against the defendant." *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So.2d 1234, 1238 (La.1993). Thus, a plaintiff's right to judicially assert the "action" against a defendant depends upon the existence of a "cause of action." When there is a cumulation of actions, each party's demand for enforcement of a legal right against each defendant is regarded as a separate action. *Lane Memorial Hosp. v. Watson*, 734 So.2d 28 (La. App. 1 Cir. 1999)(rev'd on other grounds). Further, recovery of damages based on individual wrongful death and survival causes of action should not be affected or diminished by the joinder of those multiple plaintiffs in one lawsuit. *Tureaud v. Acadiana Nursing Home*, 696 So.2d 15 (La. App. 3 Cir. 1997). The causes of action remain the same, i.e., wrongful death and survival actions. *Id.*

In *Ly v. State Through Dept. of Public Safety,* 633 So.2d 197 (La. App. 1 Cir. 1993), the court held, in a wrongful death action against the state for the death of a parent, that each plaintiff could have brought suit separately for their wrongful death actions, thereby entitling each to a separate legal damage award cap. *Id.* The court reiterated the principal that each party's demand for enforcement of a legal right is regarded as a separate action which may be cumulated in a single suit where there is a community of interest, each action is within the jurisdiction of the court and in the proper venue, and all actions are mutually consistent and employ the same form of procedure. *Id., citing* LSA-C.C.P. art. 463; *Ryland v. Liberty Lloyds Insurance Company,* 617 So.2d 583, 590 (La.App. 3rd Cir.1993). Further, the court stated that the "mere fact that all actions were brought together should not serve to penalize plaintiffs. Each child

has a separate cause of action against defendants as a result of the child's loss of his or her parents." *Ly v. State Through Dept. of Public Safety,* 633 So.2d 197.

In the present case, the petitioners, Barbara Caruso and David Caruso share the same cause of action, in that the actions of Dr. Morris make up a set of operative facts which create a right of action for malpractice and wrongful death for the death of Baby David. However each of the plaintiffs has a **separate and distinct *claim* or *right of action*** for the death of their child. The fact that they are joined in one action should not suggest that dismissal of one plaintiff automatically implies dismissal of the other. Here, any actions taken by Barbara Caruso should not be imputed upon David Caruso. He did not acquiesce in her actions, and in fact, David Caruso was completely unaware of her actions. Thus, even if this Court determines that Barbara Caruso had constructive knowledge of Dr. Morris' malpractice by virtue of her request for records, that knowledge should not be imputed to David Caruso. David Caruso's affidavit clearly states that he had no idea that there was a potential claim. Nowhere in the record is there any evidence that David Caruso knew that Barbara had requested or received medical records. Thus, even assuming, *arguendo*, that Barbara had constructive knowledge of defendant's malpractice in 1994, the claims of David Caruso should not be affected. Therefore, the Court of Appeal erred in granting a blanket ruling which has the effect of dismissing the claims of both parties in that if prescription has run at all, which the Carusos stringently deny, it has run ***only against Barbara Caruso***, thereby allowing David Caruso to pursue his separate and distinct cause of action against Dr. Morris. To hold otherwise would be tantamount to a denial of Due Process as to David Caruso, as outlined more fully hereinafter, and as such, petitioners request that this Court GRANT Certiorari in this matter and REVERSE the judgment of the Fourth Circuit Court of Appeals *at least as to David Caruso's claims.*

B. The Dismissal of the Claims of Barbara Hilchey Caruso and David Caruso amounts to a denial of Due Process in Violation of the 5th and 14th Amendments

Additionally, petitioners insist that the action of the Fourth Circuit Court of Appeals for the State of Louisiana violates the Due Process Clauses of the 5th and 14th Amendments. The action of the Court of Appeals in reversing the trial court denied the Caruso's their constitutionally protected right to assert a cause of action against respondent, Dr. George Morris, for his negligent treatment of Mrs. Caruso during her pregnancy, and the resultant stillbirth of their child. As such, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

In *Mullane v. Central Hanover Bank & Trust Co.* , 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) this Court noted that "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* , at 313, 70 S.Ct., at 656. Thus, in any Due Process case, the Court has fashioned a two-part inquiry: first the Court must determine whether the petitioner was deprived of a protected interest, and, if so, what process was due.

The first question, was addressed by the Mullane case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause. There, the Court confronted a challenge to a state law that provided for the settlement of common trust fund accounts by fiduciaries, upon notice given through newspaper publication. The effect of the statute was to terminate "every right which beneficiaries would otherwise have against the trust company ... for improper management of the common trust fund." *Id.*, at 311. This, the Court concluded, worked to deprive the beneficiaries of property by, among other things, "cut[ting] off their rights to have the trustee answer for negligent or illegal impairments of their interests." *Id.*,

at 313, 70 S.Ct., at 656. Such a result, the Court held, was impermissible unless constitutionally adequate notice and hearing procedures were established before the settlement process went into effect. *Id.*, at 315, 70 S.Ct., at 657.

The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale v. Rogers* , 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) , for example--where a plaintiff's claim had been dismissed for failure to comply with a trial court's order--the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.* , at 209, 78 S.Ct., at 1094. *See also Hammond Packing Co. v. Arkansas* , 212 U.S. 322, 349-351, 29 S.Ct. 370, 379-380, 53 L.Ed. 530 (1909) (power to enter default judgment); *Hovey v. Elliott* , 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) (same); *Windsor v. McVeigh* , 93 U.S. 274, 23 L.Ed. 914 (1876) (same). Cf. *Wolff v. McDonnell* , 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.Ed.2d 113 (1971).

Petitioners here insists that the action of the Louisiana Fourth Circuit Court of Appeals did exactly what this Court has held, time and again, is impermissible under the Due Process Clauses of the 5th and 14th Amendments. The Court of Appeals went outside the record in determining that the cause of actions asserted by the petitioner had prescribed (or that the statute of limitations had run). The court did not afford the petitioners an opportunity to put on the merits of their case. The district court, in denying the Exception of

Prescription, attempted to allow petitioners that opportunity, by referring the Exception to trial on the merits, where the disputed factual issues affecting prescription could be fairly and fully adjudicated. However, the Court of Appeals took that right away from the Petitioners summarily, without even affording petitioners the right to oral arguments. Clearly, this is a case where the Court of Appeals not overstepped their supervisory discretion, but also overstepped the bounds of Due Process, and effectively depriving Barbara and David Caruso of a constitutionally protected property interest in their causes of action.

The hallmark of property, this Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." *Memphis Light, Gas & Water Div. v. Craft* , 436 U.S. 1, 11-12, 98 S.Ct. 1554, 1561-1562, 56 L.Ed.2d 30 (1978); *Goss v. Lopez* , 419 U.S. 565, 573-574, 95 S.Ct. 729, 735-736, 42 L.Ed.2d 725 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 576-578, 92 S.Ct. 2701, 2708-2709, 33 L.Ed.2d 548 (1972) . And, just as this Court held in *Martinez v. California*, 444 U.S. 277 (1980), " a state tort claim is a "species of 'property' protected by the Due Process Clause."

It has been held that "each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982), citing *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 1263, 63 L.Ed.2d 552 (1980) . *See also Arnett v. Kennedy*, 416 U.S., at 166-167, 94 S.Ct., at 1650-1651 (POWELL, J., concurring in part); id. , at 211, 94 S.Ct., at 1672 (MARSHALL, J., dissenting). Indeed, as the Court held, any other conclusion would allow the State to "destroy at will virtually any state-created property interest." Logan. In other words, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.

Id. See also *Vitek v. Jones*, 445 U.S., at 490-491.

As this Court's decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. *Logan, supra.* Thus it has become a truism that "some form of hearing" is required before the owner is finally deprived of a protected property interest. *Board of Regents v. Roth*, 408 U.S., at 570-571, n.8, 92 S.Ct., at 2704-2705. And that is why the Court has stressed that, when a "statutory scheme makes liability an important factor in the State's determination ..., the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing." *Bell v. Burson*, 402 U.S., at 541, 91 S.Ct., at 1590. To put it as plainly as possible, this Court has held that the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. *See id.*, at 542.

Petitioners insist that the Court of Appeals has done just that – they have deprived them their right to their cause of action without affording them minimal constitutional procedures to present their claim. This is due to the fact that, as outline more fully hereinafter, in order to determine if the petitioners' cause of action has prescribed under the law and jurisprudence of Louisiana, a full evidentiary hearing is required. The district court agreed with this assessment, and therefore denied the Exception of Prescription, to at least give the petitioners their day in court. However, the Court of Appeals, without even hearing oral arguments in the case, reversed that decision, and in so doing deprived the Carusos of their Due Process rights to have their claim heard. As such, applying Louisiana law to this matter, this Court should GRANT Certiorari to review the unconstitutional action by the Louisiana Fourth Circuit Court of Appeals.

C. The court of appeal erroneously reversed the trial court's ruling as to both David Caruso and to Barbara Caruso since the legal standard of appellate review requires the trial court's ruling to have clearly been erroneous,

and despite the legal requirement that the law be strictly construed in favor of the claim and against prescription.

Petitioners insist that the ruling of the Court of Appeals is erroneous as it fails to take into consideration the vast discretion granted to the trial court in ruling on an Exception of Prescription. Additionally, the court's ruling has the effect of hindering the discretion of the trial court to refer an Exception to trial on the merits. For these reasons, this Honorable Court should REVERSE the Fourth Circuit's ruling, and allowing the petitioners to proceed with trial on the merits, where all of the issues concerning prescription can be adequately addressed.

i. The Court made factual and credibility determinations which are the proper province of the trial court.

Petitioners insist that this Court failed to elaborate upon the standard of review employed in determining the issue of prescription. In reviewing a peremptory exception of prescription, an appellate court will review the entire record to determine whether the trial court's finding of fact was manifestly erroneous. *Morrison v. C.A. Guidry Produce,* 03-307 (La. App. 3 Cir. 10/1/03), 856 So.2d 1222. Further, "the standard controlling review of a peremptory exception of prescription requires that this court strictly construe the statutes 'against prescription and in favor of the claim that is said to be extinguished.' " *Security Ctr. Prot. Servs., Inc. v. All-Pro Security, Inc.,* 94-1317, 94-1318, p. 12 (La. App. 4 Cir. 2/23/95), 650 So.2d 1206, 1214 (*quoting Louisiana Health Serv. v. Tarver,* 635 So.2d 1090, 1098 (La.1994)).

On the hearing of a peremptory exception of prescription pleaded prior to trial on the merits, evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition. La. C.C.P. Art. 931. *Waguespack v. Judge,* 877 So.2d 1090 (La. App. 5 Cir. 2004).

When evidence is introduced at a hearing on an exception of prescription, the trial court's findings of fact are reviewed under the manifest error standard. *Perez v. Trahant,* 806 So.2d 110 (La. App. 1st Cir. 2001). If the findings are reasonable in light of the record reviewed in its entirety, ***an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed evidence differently***. *Id.* (emphasis added).

In the case of *Roberts v. Murphy Oil Corp.*, 577 So.2d 308 (La. App. 4 Cir. 1991), the court was faced with a similar situation. There, on an Exception of Prescription, the Court of Appeal remanded an action back to the trial court to determine whether the plaintiffs had constructive knowledge of their cause of action prior to running of prescription. The Court held that the resolution of the conflict or ambiguity concerning whether the plaintiffs had constructive knowledge, "will require a credibility determination which we cannot make on the appellate level . . . This factual determination should be made by the trial judge who has the benefit of the live testimony . . . and who must weigh it against [a] seemingly ambiguous or contradictory affidavit." *Id.*

In this case, the trial court made determinations based on the evidence presented, and ruled in accordance with those determinations. The trial judge, Honorable Ethel Simms Julien, was convinced that the Exception must be referred to trial on the merits in order to fully appreciate the issues, and to resolve contradictory testimony and evidence. Without such a full trial on the merits, it is impossible for that court, or any other court, to make an accurate determination of the facts underlying respondent's Exception.

Further, since the trial court's findings of fact should not be disturbed absent a clear showing of manifest error, the September 29, 2004 ruling of the Court of Appeal should be REVERSED. The trial judge is in the best position to make such determinations, and petitioners insist that her findings in this matter are not clearly erroneous. Both David and Barbara Caruso submitted affidavits which stated that, prior to June 20, 1996, they did not have any

information or reason to believe that the explanation Dr. Morris gave them for baby David's death was not correct, nor did they believe Dr. Morris had done anything wrong. In fact, the uncontroverted testimony of the parties in this matter shows that Barbara Caruso continued to treat with Dr. Morris for years following the incident, further proving that the Caruso's had no knowledge of any wrongdoing on the part of Dr. Morris. The trial court found these facts needed to be tried on the merits, and the Court of Appeals should not have overturned those findings in the present case.

ii. The trial court has discretion to refer an Exception of Prescription to trial on the merits.

Additionally, petitioners submit that the trial court has great discretion in deciding whether to refer an Exception to trial on the merits. Petitioners pray that this Court will overturn the Court of Appeals' ruling in light of the fact that the trial court in the present case acted well within its discretion when it denied defendant's Exception of Prescription.

La.Code Civ.Proc. art. 929 provides:

> A. The declinatory exception, the dilatory exception, and the peremptory exception when pleaded before answer, shall be tried and decided in advance of the trial of the case.
>
> B. If the peremptory exception has been pleaded in the answer, or subsequently, but at or prior to the trial of the case, it shall be tried and disposed of either in advance of or on the trial of the case. If the peremptory exception has been pleaded after the trial of the case, the court may rule thereon at any time unless the party

> against whom it has been pleaded desires and is entitled to introduce evidence thereon. In the latter event, the peremptory exception shall be tried specially.

The language of Article 929A, applied literally, indicates that exceptions pleaded before the filing of an answer must be tried and decided prior to trial. However, La. Code Civ. Proc. art. 1001, pertinent to the delay for answering, provides a special period for filing an answer after "an exception is filed prior to answer and is overruled or referred to the merits...." *Short v. Griffin*, 656 So.2d 635 (La. 1995).

The Court in *Short* interpreted Articles 929 and 1001 together to mean that a "peremptory exception pleaded before answer must be scheduled for trial in advance of the trial on the merits, but that ***the judge's options in deciding the trial of the exception include referring the exception to the merits in appropriate cases***." *Id., emphasis added.* The principal purpose of Article 929, with respect to peremptory exceptions, is to prevent a defendant from employing dilatory tactics by filing a peremptory exception after answer and demanding trial of the exception in order to delay the trial on the merits. *See* La.Code Civ.Proc. art. 929, Official Revision Comment (b). *See also Montgomery v. Breaux,* 297 So.2d 185, 188 (La. 1974); *Short v. Jones,* 457 So.2d 201, 203- 204 (La.App.2d Cir.), *cert. denied,* 460 So.2d 606 (La.1984). The Court went on to state that "[t]he purpose was not to divest the trial court of the long-recognized discretion to refer peremptory exceptions to the merits." *Id.*

In *Short*, the trial court found that "the evidence on prescription is so intertwined with the evidence of the merits" that it would be a waste of judicial economy to try the two matters in separate proceedings. *Id.* The Court agreed that this was not an abuse of discretion.

This is exactly the issue in the present case. Because this

case is so fact-sensitive, in that the testimony and evidence must be properly weighed by a finder of fact in order to determine if Dr. Morris' action or inaction rose to the level of misrepresentation, concealment or fraud, this matter should be referred to trial on the merits because the ***evidence on the issue of prescription is so intertwined with the evidence on the merits***. If the trier of fact determines that Dr. Morris knew or should have known of the true cause of the infant's death, and that the explanation he offered to the Carusos was knowingly false and disingenuous, then the actions of Dr. Morris would thereby rise to the level of misrepresentation, concealment or fraud, and the petitioners' lawsuit would have been timely filed. It should be again mentioned that, according to testimony provided by the Carusos, ***at no point did Dr. Morris ever even mention the possibility of Beta Strep with the Carusos, even though he ordered Beta Strep tests***. Again, this is an issue of evidence and credibility which is more appropriately decided by a trier of fact, not the court of appeals. Therefore, this matter should be referred to a trial on the merits, and respondent's Application for Supervisory Writ should have been denied. As such, petitioners request that this Honorable Court GRANT their Petition for Writ of Certiorari and REVERSE the judgment of the Fourth Circuit Court of Appeals.

D. The appellate court erroneously reversed the trial court's ruling that this prescription exception requires resolution of issues of fact and credibility, including not only Dr. Morris' explanation to the Carusos of the reason for the infant's death, but also when the Carusos had good reason to doubt the treating physician's explanation and to assert a malpractice claim.

The trial court found, correctly, that the issue of prescription could only be adequately determined by a trial on the merits. This is so because credibility and factual disputes must be resolved in order to properly rule on the exception.

The Fourth Circuit stated, in its Judgment, that the third category of *contra non valentum* did not apply in this matter, nor did the classification of this matter as a wrongful death action operate to suspend prescription, since Barbara Caruso had requested medical records surrounding her pregnancy and birth as early as 1994. However, the Court failed to entertain the notion that Mrs. Caruso was not seeking the records with any knowledge or suspicion that any wrongdoing had been committed by Dr. Morris. Barbara Caruso insists that she only ordered copies of medical records to help her evaluate, in the future after the grieving process, the risks and possibilities of another pregnancy. To conclude that the Carusos had constructive knowledge of Dr. Morris' possible negligence by simple virtue of them having access to their medical records is error. Everyone has access to his or her medical records. However, without any evidence, or suggestion, that something inculpatory might lie in those records, a person would have no reason to search, and thus petitioners ***did not*** have actual or constructive knowledge of the malpractice of Dr. Morris until July, 1996.

Prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort. *Percy v. State, E.A. Conway Memorial Hosp.*, 478 So.2d 570 (La.App. 2 Cir.1985). Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. *Campo v. Correa*, 828 So.2d 502 (La. 2001). Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. *Id.* Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start running of prescription. *Ledet v. Miller,* 459 So.2d 202 (La.App. 3 Cir.1984) ,*writ denied,* 463 So.2d 603 (La.1985); *Bayonne v. Hartford Insurance Co.,* 353 So.2d 1051 (La.App. 2 Cir.1977); *Opelousas General Hospital v. Guillory,* 429 So.2d 550 (La.App. 3 Cir.1983). Nevertheless, "a plaintiff's mere apprehension that something may be wrong is insufficient to commence the running of prescription unless the plaintiff knew or should have known through the exercise of reasonable diligence that his problem may have been caused by acts

of malpractice." *Campo, 828 So.2d 502, citing Gunter v. Plauche,* 439 So.2d 437, 439 (La.1983). Further, "even if a malpractice victim is aware that an undesirable condition has developed after the medical treatment, prescription will not run as long as it was *reasonable* for the plaintiff not to recognize that the condition might be treatment related." *Campo, 828 So.2d 502, citing Griffin v. Kinberger,* 507 So.2d 821 (La.1987). The ultimate issue is the *reasonableness* of the patient's action or inaction, in light of his education, intelligence, the severity of the symptoms, and the nature of the defendant's conduct. *Id.*

The Carusos are both lawyers. They are educated and intelligent people. However, ***they are not medical doctor***s, and they rely on the expert advice of their doctor. Petitioners do not have the expertise or knowledge to determine, by way of review of the medical records, what the possible cause of death was. They further have no knowledge or understanding of the medical terminology or meaning of "Beta Strep" sufficient to put them on notice. As their affidavits make clear, the Carusos placed their complete trust in Dr. Morris and they relied on him and had no reason to question his judgment.

Petitioners insist that it is reasonable for any person to behave the same way. It is precisely because of the sanctity of the doctor-patient relationship that this matter is before the Honorable Court. It was the special relationship that existed between Mrs. Caruso and Dr. Morris that prevented the Carusos from discovering the existence of a claim. The Caruso's had no reason to believe that Dr. Morris had been negligent in his treatment. Barbara Caruso may have been granted access to the medical records, but Dr. Morris' continued assurances that the incident was unpreventable effectively prevented the Caruso's from believing that anything contained in the records would show that malpractice had been committed. As further evidence, Barbara Caruso did nothing with the records for more than two (2) years after obtaining them. She did not seek outside advice. She did not attempt to analyze the records herself. The fact of the matter is that neither Barbara Caruso nor David

Caruso is a medical doctor. Thus, simply allowing someone to see medical records does not necessarily indicate that they are cognizant of a claim.

Further, the actions of Barbara Caruso in requesting the records should not raise the presumption that she had constructive knowledge of a potential claim, given the facts as they are in this case. Here, we have a family who has been devastated by the stillbirth of their second child. Why would Barbara Caruso request the medical records, and then do nothing with them for a period of more than two (2) years, and only then to determine risk factors in a future pregnancy? Because Mrs. Caruso never had any intention, or justification, for believing that anything inculpatory was contained in those records. Barbara Caruso was merely behaving like any other person who has just experienced the death of a child. The Caruso's were grieving, angry, and desperate. Mrs. Caruso was not requesting the medical records with suspicion that Dr. Morris had been negligent. She was simply searching for answers that she knew did not exist. Besides, if we are to believe that possession of one's medical records is enough to put a person on constructive notice of wrongdoing, then it is certain to become common practice for ***all*** doctors to provide ***all*** their patients with copies of medical records as a gratuity after every visit - "just in case." Petitioners insist that the purpose of the prescription statutes does not encompass such a notion. A curious patient is not necessarily a suspicious one.

This truth is made clearer by the fact that ***after*** Mrs. Caruso requested the records, she continued treating with Dr. Morris, and even underwent delicate surgery at his hands. If Mrs. Caruso was ever concerned, or suspicious, that Dr. Morris had been negligent in his treatment, and responsible for the death of baby David, is it reasonable to believe that she would continue to treat with him in another pregnancy, and even submit to a risky, and complicated procedure? The answer is a resounding "No."

The Caruso's did not suspect Dr. Morris of any negligence. There was a relationship of trust between Dr. Morris and the

Carusos. As such, the Carusos were reasonable in relying on what the Doctor said concerning the possible, and probable, causes of baby David's death. Simply because Mrs. Caruso obtained the medical records from Dr. Morris should not suggest that she had any reasonable notice that Dr. Morris may have been responsible. A locked box is useless without the key. Dr. Morris held the key, but refused to turn it over. By reassuring the Caruso's that the cause of death was unpreventable, he withheld the key to unlock the box. By omitting beta-strep as a possible cause, he concealed another salient piece of information that could have been used to unlock the box. In short, Dr. Morris repeatedly and intentionally covered up facts surrounding baby David's death, and as such, the Caruso's were not unreasonable in failing to discover the existence of a possible claim, even though Mrs. Caruso was given access to the medical records.

Courts have held that a continuing relationship between a doctor and a patient after malpractice has occurred, known as the "continuous tort" theory, fits into the third category of *contra non valentem*. *See In re Medical Review Panel for Claim of Moses,* 788 So.2d 1173 (La. 2001). There the Court stated that "for there to be a continuing tort there must be a continuing duty owed to the plaintiff and a continuing breach of that duty by the defendant." *Id. citing* 54 C.J.S. Limitations of Actions § 177 (1987) *and Crump v. Sabine River Authority,* 737 So.2d 720 (La. 1999).

Rejecting the contention that the continuing breach of duty could consist of the defendant's failure to remedy the harm caused by the initial tortious conduct, the Court stated that generally the breach of the duty to right a wrong and make the plaintiff whole simply cannot be a continuing wrong which suspends the running of prescription. *Crump*, 737 So.2d at 728. An exception, however, has been recognized when a special relationship, such as patient-physician or attorney-client, exists between the parties. In other words, "the continuation of a special relationship offers the possibility of correction of an injury and thus may postpone the running of prescription." *In Re Medical Review Panel for Claim of Moses,* 788 So.2d at 1180.

The reasoning behind this exception is stated most plainly as follows:

> [T]he doctor, who is in a fiduciary relationship with the plaintiff, has a continuing duty to disclose the known material information, not only on the day that the doctor learns of the information, but also on every day thereafter until the patient learns the information from another source. Breach of this continuing duty is analogous to a continuing tort, and a new cause of action (with a new prescriptive or peremptive period) arises each day that the doctor fails to disclose ... the material information known by the doctor but not by the patient, and thereby effectually prevents the patient from availing himself or herself of the cause of action.

Whitnell v. Silverman, 686 So.2d 23 (La. 1996), Lemmon dissenting.

In *Taylor v. Giddens*, 618 So.2d 834 (La.1993), the court noted that continued treatment combined with a continued professional relationship could result in a suspension of prescription. The court further noted that two appellate cases have recognized this principle, which is based on the fact the continuing relationship is "likely to hinder the patient's inclination to sue." 618 So.2d at 843 (*citing Trainor v. Young*, 561 So.2d 722 (La. App. 2d Cir.)

In the present case, there is clearly an ongoing relationship between the petitioners and respondent up until the time that they

received information from Dr. Krane that Dr. Morris was negligent in his treatment of Mrs. Caruso and baby David. The Carusos continued to treat with Dr. Morris, and continued to trust in his judgment after the death of baby David, even submitting to surgery by him over three years later. When the true facts became known that the baby had died of Beta Strep infection, and not feto-maternal bleed (as had been suggested by Dr. Morris), and that the infection could have been, and should have been treated easily, a claim was filed within a year. Thus pursuant to this category of *contra non valentem*, petitioners' lawsuit was timely filed. As such, petitioners respectfully request that this Honorable Court GRANT Certiorari to review the issues presented herein.

CONCLUSION

Petitioners filed their claim within one year of acquiring knowledge that Dr. Morris' treatment deviated from the standard of care, and therefore, pursuant to the doctrine of *contra non valentum*, their claims did not prescribe. Further, because this action is one for wrongful death, the general doctrine of pure "discovery" applies to toll the running of prescription until petitioners were made aware of a potential case of action. The affidavits of the petitioners, attached hereto as Appendices "D" and "E", and made a part hereof, show that Dr. Morris failed to disclose the true problem and cause of death, a Beta Strep infection which was readily treatable prophylactically. Instead, Dr. Morris supplied another explanation involving a rare and unpreventable feto-maternal bleed. The Carusos accepted Dr. Morris' explanation and Mrs. Caruso continued to treat with him as her obstetrician, even allowing him to perform serious surgery upon her more than two years after the death of baby David. Only in June of 1996 did the Carusos learn of the real cause of death, and that Dr. Morris had committed malpractice. They then timely filed their claim within one year from that date. Plaintiffs insist, and the Trial Court agreed, that Defendant's Exception of Prescription is without merit, and to give it any serious hearing and resolution one way or the other, would require testimony from Drs. Morris and Krane, as well as the Carusos, before a trier of

fact. The Fourth Circuit was clearly erroneous in its summary decision overturning the Trial Court as such decision was soundly within the discretion of the Trial Court.

For all the foregoing reasons, plaintiffs respectfully request that this Court GRANT petitioners' Petition for Writ of Certiorari, REVERSING the Fourth Circuit Court of Appeal and REINSTATING the judgment of the Civil District Court for the Parish of Orleans, Honorable Ethel Simms-Julien.

Respectfully submitted,

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New Orleans, Louisiana 70130
Telephone: (504) 522-9413
Counsel for Defendant/ Petitioner
* Attorney of Record

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Petition for Writ of Certiorari to all counsel of record in this matter by placing same in the U.S. mail, properly addressed and postage pre-paid on this 27th day of April, 2005.

S/ PATRICK H. HUFFT

APPENDIX A

Supreme Court of Louisiana.
Barbara Hilchey CARUSO Wife of/ and David E. Caruso
v.
Dr. George B. MORRIS, III.
No. 2004-CC-2895.
Jan. 28, 2005.

In re Caruso, Barbara Hilchey et al.; Caruso, David E.;-Plaintiff(s); Applying for Supervisory and/or Remedial Writs, Parish of Orleans, Civil District Court Div. N, No. 99-09216; to the Court of Appeal, Fourth Circuit, No. 2004-C-1554.
Denied.

CALOGERO, C.J., would grant the writ.
La. 2005.
Caruso v. Morris
893 So.2d 81, 2004-2895 (La. 1/28/05)

APPENDIX B

NO. 2004-C-1554

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA
BARBARA HILCHEY CARUSO, WIFE OF/AND
DAVID CARUSO
VERSUS
DR. GEORGE B. MORRIS, III

IN RE: DR. GEORGE B. MORRIS, III
APPLYING FOR: SUPERVISORY WRIT
DIRECTED TO: HONORABLE ETHEL SIMMS JULIEN,
JUDGE, CIVIL DISTRICT COURT, ORLEANS PARISH
DIVISION "N", 99-09216

WRIT GRANTED; TRIAL COURT JUDGMENT REVERSED

In this wrongful death and survival action filed by plaintiffs, Barbara Hilchey Caruso and David E. Caruso, Jr., arising out of alleged medical malpractice, the defendant, Dr. George B. Morris, III, seeks review of a judgment denying his peremptory exception of prescription.

FACTS AND PROCEDURAL HISTORY

Dr. Morris, an obstetrician-gynecologist, treated Mrs. Caruso during her two pregnancies, as well as on other occasions. Her first child, Elizabeth, was delivered in 1991, and her second child, David, was delivered stillborn at fullterm on March 29, 1993. Following an autopsy, an autopsy report listed the infant's cause of death as unknown. Shortly thereafter, Dr. Morris and his associate advised the plaintiffs that the likeliest cause of death was a fetal-maternal bleed, a very rare and unpreventable condition.

A year later in March 1994, the plaintiffs' requested and obtained Mrs. Caruso's medical records from Dr. Morris and Southern Baptist Hospital. Meanwhile, Dr. Morris continued to treat Mrs. Caruso, including performing laparoscopic surgery on her in May 1995.

Sometime thereafter, the plaintiffs consulted Dr. Marvin Krane, an obstetrician-gynecologist in Pennsylvania and an acquaintance of Mr. Caruso, to ascertain any risks that could likely affect any future pregnancies. After reviewing Mrs. Caruso' medical records, Dr. Krane informed the plaintiffs on June 20, 1996, that Dr. Morris failed to properly treat Mrs. Caruso for a Beta Strep infection during her pregnancy with Baby David and had he given her preventative antibiotics, she would have given birth to a healthy baby boy.

Nearly a year later, on June 17, 1997, the plaintiffs filed a request for a medical review panel. After convening, the medical review panel rendered an opinion on March 18, 1999, in favor of Dr. Morris, finding that he did not breach the applicable standard of care. Thereafter, the plaintiffs filed suit against Dr. Morris on June 4, 1999.

Dr. Morris filed an exception of prescription, arguing that the plaintiffs' medical malpractice claim had prescribed either on year or, at the very latest, three years from the date of the stillborn delivery, citing La. R.S. 9:5628. in opposition to the exception, the plaintiffs invoke the doctrine of *contra non valentum*, arguing that Dr. Morris knew of the actual cause of death but failed to disclose it, causing them to be unaware of the true facts. They contend that it was not until June 20, 1996, he date Dr. Krane contacted them after reviewing Mrs. Caruso's medical records, that they first discovered their son's death was due to Dr. Morris' negligence, and thus, they had one year from that date to file their claim.

LAW AND DISCUSSION

The plaintiffs' petition sets forth both a wrongful death action and a survival action. In T*aylor v. Giddens*, 618 So.2d 834 (La. 1993), the Louisiana Supreme Court held that, although a wrongful

death action may have its genesis in an act of malpractice, it is not a malpractice action. Thus, the court held that a wrongful death action arising from medical malpractice is not governed by the prescriptive period for medical malpractice actions, La. R.S. 9:5628, but rather by the one-year prescriptive period applicable to delictual actions, La. C.C. art. 3492, which commences to run on the date of the malpractice victim's death. Survival actions arising from acts of medical malpractice, however, are governed by La. R.S. 9:5628.

La. R.S. 9:5628, as it applies to the plaintiffs' survival action, sets forth the applicable prescriptive period for medical malpractice actions as follows:

> A. No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital or nursing home duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act or omission, or neglect or within one year from the date of discovery of the alleged act, omission or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at least within a period of three years from the date of the alleged act, omission or neglect.

Ordinarily, the exceptor bears the burdem of proof at the trial of the peremptory exception, including the objection of prescription. *SS v. State ex rel. Dept. of Social Services*, 2002-0831, pp. 6-7 (La. 12/4/02), 831 So.2d 926, 931. If a petition reveals on its face that prescription has run then the burden shifts to the plaintiff to show that his action has not prescribed. *Id.*, 2002-0831, p. 7, 831 So.2d at 931.

In the instant case, the petition states clearly that the plaintiffs filed their request for a medical review panel on June 17, 1997, more than four years after the date of Mrs. Caruso's stillborn delivery and their son's death. Clearly, under either the one-year prescriptive period for a wrongful death action or the three year prescriptive period of La. R.S. 9:5628, prescription had run. Thus the burden shifted to the plaintiffs to show that their claims had not prescribed.

Prescription runs against all persons unless exception is established by legislation. La. C.C. Art. 3467. The doctrine of *contra non valentum* is a judicially-created exception to this express statutory rule, which suspends the running of prescription in four situations:

> (1) Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
> (2) Where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting;
> (3) Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action;
> (4) Where the cause of action is not known or reasonably knowable by the plaintiff, even though the defendant does not induce his ignorance.
> *Fontenot v. ABC Insurance Co.*, 95-1707 (La. 6/7/96), 674 So.2d 960, 963.

The dispositive issue in this case is whether *contra non valentum* applied to the running of prescription as to either the plaintiffs' survival action or wrongful death actions.

The first and second categories of *contra non valentum* are not relevant to this medical malpractice case. The fourth category, known as the "discovery exception," cannot suspend prescription as to the plaintiffs' survival action because La. R.S. 9:5628 provides that all malpractice claims must be filed at the latest within a period

of three years from the date of the alleged act, omission or neglect, even those filed within one year from the date of discovery. *See Fontenot*, 674 So.2d at 963. The plaintiffs' request for a medical review panel, while filed within one year from the date they discovered the alleged malpractice, was filed more than four years after the stillborn delivery of their son, which was the latest act giving rise to the survival action under La. R.S. 9:5628.

The question then remains whether the plaintiffs' have shown that the discovery exception of *contra non valentum* suspended the running of the one-year prescriptive period on their wrongful death claim.

In *Campo v. Correa*, 2001-2707 (La. 6/21/02), 828 So. 2d 502, the Louisiana Supreme Court set forth the applicable law concerning actual and constructive knowledge of facts indicating to a reasonable person that he or she is a victim of a tort, thus commencing the running of prescription:

> Prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort. *Percy v. State, E.A. Conway Memorial Hosp.*, 478 So.2d 570 (La. App. 2 Cir. 1985). A prescriptive period will begin to run even if the injured party does not have actual knowledge of facts that would entitle him to bring a suit as long as there is constructive knowledge of same. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry . . . Nevertheless, a plaintiff's mere apprehension that something may be wrong is insufficient to commence the running of prescription unless the plaintiff knew or should have known through the exercise of reasonable diligence that his problem may have been caused by acts of malpractice. *Gunter v. Plauche*, 439 So.2d 437, 439 (La. 1983). Even if a malpractice victim is

> aware that an undesirable condition has developed after the medical treatment, prescription will not run as long as it was reasonable for the plaintiff not to recognize that the condition might be treatement related. *Griffin v. Kinberger*, 507 So.2d 821 (La. 1987). The ultimate issue is the reasonableness of the patient's action or inaction, in light of his education, intelligence, the severity of the symptoms, and the nature of the defendant's conduct. *See Griffen*, 507 So.2d at 821.

Campo, 2001-2707, pp. 11-12. 828 So.2d at 510-511.

To satisfy their burden, the plaintiffs submitted their own affidavits, stating that they first discovered their son's death might have been the result of Dr. Morris' negligence when they spoke to Dr. Krane on June 20, 1996. They assert that prior to that date they fully accepted Dr. Morris's explanation for the baby's death and had no reason to doubt him, as evidenced by the parties' ongoing doctor-patient relationship.

Dr. Morris, on the other hand, submitted Mrs. Caruso's deposition testimony, a copy of the request for medical records form completed by Mrs. Caruso to obtain her medical records from Southern Baptist Hospital, as well a copy of Mrs. Caruso's letter to him requesting her medical records. At her deposition, Mrs. Caruso testified that Dr. Morris, after receiving the results from various lab tests and the autopsy report that failed to provide the exact cause of death, offered to refer the plaintiffs to a specialist in perinatology at the LSU Medical Center for further consultation, but they declined the offer. She further testified that although she continued to be treated by Dr. Morris, she requested and received her medical records in March 1994. On the hospital medical records release form Mrs. Caruso stated her reason for the request as "REVIEW – POSSIBLE CLAIM." When asked about this during her deposition, Mrs. Caruso stated that she and her husband wanted another obstetrician-gynecologist to review the records, yet she never denied that filing a claim was a reason they wanted them. In any event,

once the plaintiffs obtained the medical records they had constructive knowledge of all the facts and circumstances surrounding their son's death. Thus, at the latest, the plaintiffs had one year from the date Mrs. Caruso obtained her medical records within which to file their wrongful death claim, i.e. no later than the end of March 1995. Furthermore, we find the plaintiffs' delay in filing suit was not reasonable considering Mrs. Caruso's testimony that both she and her husband are licensed attorneys in California and Louisiana, respectively.

As to the third category of *contra non valentum*, it applies when the health care provider has done some act to prevent the victim from availing himself of his cause of action for medical malpractice. *Fontenot*, 674 So.2d 963, citing *Taylor v. Giddens*, 618 So.2d 842. To trigger application of this category of *contra non valentum*, a physician's conduct must rise to the level of concealment, misrepresentation, fraud or ill practice. *Fontenot*, 674 So.2d at 963, citing *Rajnowski v. St. Patrick's Hospital*, 564 So.2d at 676. In this particular case, although the plaintiffs allege that Dr. Morris knew of their son's cause of death but failed to disclose it, they put forth no evidence that even remotely supports a finding of any concealment, misrepresentation, fraud or ill practice by Dr. Morris. In fact, Mrs. Caruso testified that Dr. Morris wanted to refer her to a perinatal specialist for further consultation and that he did nothing to prevent her from obtaining her medical records. Thus, the third category of *contra non valentum* is not applicable to suspend the running of prescription against the plaintiffs' survival or wrongful death causes of action.

Finally, the plaintiffs' assertion that the continuing doctor-patient relationship between Dr. Morris and Mrs. Caruso affected the running of prescription is without merit. When the plaintiffs obtained the medical records they had information necessary to ascertain whether they had a possible medical malpractice claim against Dr. Morris. Nothing Dr. Morris did or failed to do prevented them from timely filing their claim.

Accordingly, for the reasons stated herein, the writ application is granted and the judgment of the trial court is reversed. Judgment is hereby rendered sustaining Dr. Morris' exception of prescription dismissing the plaintiffs' suit against him.

New Orleans, Louisiana this 29th day of September, 2004

S/ JUDGE LEON A CANNIZARO, JR.

S/ JUDGE MICAHEL E. KIRBY

S/ JUDGE EDWIN A. LOMBARD

APPENDIX C

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 99-09216 DIVISION "N" SECTION: 8

BARBARA HILCHEY CARUSO, WIFE OF/AND
DAVID E. CARUSO, JR.

VERSUS

DR. GEORGE B. MORRIS, III

FILED:_____ _____
DEPUTY CLERK

JUDGMENT

The above captioned matter came before this court for hearing on April 16, 2004. The following counsel appeared:

For Plaintiff: BARBARA HILCHEY CARUSO, WIFE OF/AND DAVID CARUSO, JR.
Patrick H. Hufft, Esq., #17633

For defendant: DR. GEORGE B. MORRIS, III
Susan E. Henning, Esq., #6793

When, after considering the law and the evidence, and hearing arguments of counsel, and having taken this matter under careful advisement, the Court decided this matter in favor of plaintiff, BARBARA HILCHEY CARUSO, WIFE OF/AND DAVID CARUSO, JR., and against the defendant, DR. GEORGE B. MORRIS, III, on the Exception of Prescription filed by the defendant, DR. GEORGE B. MORRIS, III.

IT IS ORDERED, ADJUDGED AND DECREED that the Exception of Prescription filed by defendant is hereby **DENIED**.

Signed at new Orleans, Louisiana this 2nd day of August, 2004.

S/ ETHEL SIMMS JULIEN
JUDGE, CIVIL DISTRICT COURT
DIVISION N

APPENDIX "D"

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

Before me, the undersigned authority, personally came and appeared, BARBARA HILCHEY CARUSO, who, after being duly sworn, did depose and state the following, under oath:

1. When I became pregnant with my first child, Elizabeth, I selected Dr. George Morris to be my OB-GYN for my pregnancy, labor, and delivery.

2. Dr. Morris delivered Elizabeth, who was born on September 3, 1991, and handled my post-pregnancy care after Elizabeth's birth.

3. When I became pregnant again in the summer of 1992, I again selected Dr. Morris for my care during pregnancy, labor and delivery.

4. As the due date of March 29, 1993 approached, I was seeing Dr. Morris every few days, and I had an appointment scheduled with him for the morning of March 29, 1993.

5. When Dr. Morris examined me on my visit of March 29, 1993, on the due date, he found that the heart beat of the baby was slow and faint, so he sent me to Southern Baptist Hospital where an ultrasound was performed and I was told the baby had died.

6. Dr. Morris then induced labor with Pitocin and late that night I gave birth to a stillborn, full-term baby boy, who we named David.

7. After baby David's death, and the autopsy and lab work, Dr. Morris' partner, Dr. Carlomagno, and Dr. Morris, met with us at separate times and told us that the baby was fine genetically and physically.

8. We were also told that the likely cause of baby David's death was a maternal-fetal bleed, a rare and unpreventable condition, where the baby's blood leaks into the maternal circulation and the baby loses blood, gets anemic, and dies.
9. I fully accepted Dr. Morris' explanation as true and continued, post-pregnancy, in Dr. Morris' care.

10. For a long time, my grief was the overwhelming thing on my mind. We had wanted this baby so much, we had already decorated his bedroom with two baby beds to share with his sister, Elizabeth, and no he was gone.

11. For a long while, I attended the hospital's "Resolve Through Sharing" meetings, and activities for bereaved parents such as the "Walk to Remember" in Audubon Park, and a balloon release during Christmas time.

12. In my grief, I had no thought whatsoever that Dr. Morris had committed malpractice, but to the contrary, I still trusted him and continued to see him as my OB-GYN.

13. In 1995, over two years after we lost baby David, I tested positive on a home pregnancy test, but then started bleeding, and immediately called Dr. Morris.

14. When I saw Dr. Morris in 1995 for the suspected pregnancy, I trusted him fully and followed his every recommendation.

15. In fact, when Dr. Morris recommended that he perform surgery to rule out the possibility that there might be an ectopic pregnancy, I followed his advice and underwent the surgery even after I was

told by the hospital radiologist that my pre-surgery ultrasound examination showed no evidence of an ectopic pregnancy.

16. During the same period of time, I developed an extremely high fever due to an infection, and Dr. Morris treated me while I was hospitalized with massive IV antibiotics to fight the infection. It was later determined that I had pneumonia, and I continued to treat with Dr. Morris.

17. Therefore, in 1995, I entrusted not only my life, in very serious circumstances, but also my hope of pregnancy amidst the threat of an early miscarriage, to Dr. Morris. I would not have done that if I had reason to believe that Dr. Morris had previously committed malpractice in connection with the pregnancy and death of baby David.

18. At all times I considered Dr. Morris to be my OB-GYNN on a continuing basis, and I fully intended to consult with him for any future pregnancy, up to the time that my husband received a telephone call from Dr. Krane in June 1996.

19. After the suspected miscarriage in 1995, we had not been able o become pregnant, and with us getting older in age, we were concerned about out chances to have another child. That is why my husband asked an obstetrician to look at the records to see if there was anything that would assist us in getting pregnant and bringing a baby to full term.

20. On June 20, 1996, my husband received a phone call, and I noticed a strange look on his face. After he got off the telephone, I asked him what was wrong.

21. At that time, my husband told me that Dr. Krane said I had a Beta Strep infection while I was pregnant for baby David, and that Dr. Morris should have treated the infection with antibiotics during the pregnancy. If he had, our baby would have lived, according to Dr. Krane.

22. My husband and I were both shocked and in tears after that phone call. This was the first time I learned that I had Beta-Strep condition and that Dr. Morris had failed to treat it properly.

23. After much soul-searching, my husband and I decided we had to bring a claim so that the truth would come out, and perhaps, our bringing this to Dr. Morris' attention would save another baby's life in the future.

24. Up until June 20, 1996, I at no time intended to bring a claim against Dr. Morris, and I had no reason to believe Dr. Morris had done anything wrong or that his explanation for baby David's death was not true.

25. If I had any belief that Dr. Morris had committed malpractice in connection with baby David's death, I would not have continued to treat with him years later, submitting to his performing delicate surgery on me, or allowing him to treat me for life-threatening infection such as pneumonia.

S/ BARBARA HILCHEY CARUSO

Sworn to and subscribed before me, this 19th day of October, 1999, New Orleans, Louisiana.

S/ PATRICH H. HUFFT
NOTARY PUBLIC

APPENDIX E

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

Before me, the undersigned authority, personally came and appeared, DAVID E. CARUSO, JR., who after being duly sworn, did depose and state the following, under oath:

1. My wife, Barbara Hilchey Caruso, was under the care and treatment of Dr. George B. Morris, III, for her pregnancy, labor, and delivery of our first child, Elizabeth Caruso, born on September 3, 1991.

2. My wife, Barbara Hilchey Caruso, again chose Dr. Morris when she became pregnant in the summer of 1992, and she was under the care and treatment of Dr. Morris throughout this pregnancy for our second child.

3. On the due date for our second child, after nine months of what seemed a normal pregnancy, the morning of Monday, March 29, 1993, I received a telephone call from Barbara who was attending her scheduled visit at Dr. Morris' office, saying that the baby's heartbeat had sounded very weak and slow and they were rushing her to the hospital for an ultrasound examination.

4. I drove to the hospital as soon as possible, and when I arrived, I learned that there had been an ultrasound examination which showed no heartbeat and they were going to induce labor with Pitocin.

5. Our baby boy was born stillborn late that night, and we had him baptized in the morning, and named him David.

6. Later, during Barbara's hospital stay, Dr. Morris' partner, Dr. Carlomango, and Dr. Morris, spoke with us and advised us that the

baby was perfectly normal genetically and physically, but that the likely cause of his death was a fetal-maternal bleed where his blood was leaking into the mother's circulation, apparently causing anemia, blood loss, and heart failure.

7. I accepted fully and completely Dr. Morris' explanation to us that the likely cause of death was a rare and unpreventable condition – the fetal-maternal bleed – and from that point on, Barbara and I were occupied for a long time with the grieving process, including the funeral Mass, the "Resolve Through Sharing" monthly meetings at the hospital, and their activities, such as the "Walk to Remember" in Audubon Park, and the Christmas balloon release at the hospital.

8. When our bereavement subsided enough to try, we then wanted to have another child, for ourselves, and also to try to give Elizabeth a playmate, a little brother or sister, and when Barbara's home pregnancy test was positive in early 1995, but she started bleeding, she went right to Dr. Morris, who we trusted completely and considered her treating obstetrician on a continuing basis for any future pregnancies.

9. A urine test for pregnancy was taken in Dr. Morris' office which was positive, however, a subsequent vaginal ultrasound did not show signs of a pregnancy in the uterus. After some additional blood testing, Dr. Morris advised us that he found no positive evidence of a continuing pregnancy, but to rule out the danger of an ectopic pregnancy, Barbara should submit to laparoscopic surgery. We accepted his advice and recommendations completely. Another ultrasound examination was conducted in the hospital prior to the laparoscopic surgery which showed no ectopic pregnancy, nevertheless, Dr. Morris recommended the laparoscopic surgery and we accepted his advice and recommendations completely. The surgery was done and no ectopic pregnancy was found.

10. We continued, unsuccessfully, to try to get pregnant, and so, by early 1996, with a history of a stillbirth and a possible early miscarriage, and out total lack of success in getting pregnant, I asked

Dr. Marvin Krane, an obstetrician in Philadelphia who I had come to know and highly respect, if he would do me the favor of looking at the records to see is there was anything that would assist us in becoming pregnant, and if we did, in avoiding risks that might be indicated. He said he would, and looked at Barbara's medical records.

11. On June 20, 1996 I received a telephone call from Dr. Krane. He gave me truly shocking information; namely, that Barbara had a Beta Strep infection from early in her pregnancy for baby David, and that had the infection been treated prophylactically with antibiotics, as he felt Dr Morris should have done, "You would have a live baby." Dr. Krane indicated that our baby was overwhelmed in utero by this Beta Strep infection and that the untreated infection caused his death.

12. At no time prior to June 20, 1996 did I ever have information or reason to believe that the explanation Dr. Morris gave us for baby David's death was not correct, nor did I believe Dr. Morris had done anything wrong. When Dr. Krane called me and gave me information concerning baby David's death, it was startling and shocking to me and started the grieving process all over again.

13. Before June 20, 1996, I never had any idea whatsoever that there was malpractice, but to the contrary, had accepted Dr. Morris' explanations and trusted him fully.

14. The fact that my wife and I had full trust in Dr. Morris is shown by our agreeing to further care and treatment by him, and even surgery by him in 1995. And up until June 20, 1996, we had fully intended to have Dr. Morris attend Barbara in any future pregnancies with what he had stated would be in conjunction with referral and consultation with a high-risk obstetrical specialist who would work with him and with Barbara.

15. After learning for the first time, on June 20, 1996, of the true cause of baby David's death, my wife and I then agonized about bringing a claim because we knew the pain it would bring us.

However, once we learned the true facts concerning our child's death, we knew that however difficult, we had a duty as parents to bring the claim for our child who could otherwise have been with us and with Elizabeth. We then did timely file a claim within one year of June 20, 1996.

16. I can truthfully and sincerely state that I had no notice or knowledge of any malpractice on Dr. Morris' part before June 20, 1996, but to the contrary, I fully accepted Dr. Morris' explanations and fully concurred with Barbara's continuing to see him as her doctor.

S/ DAVID E. CARUSO, JR.

Sworn to and subscribed before me, this 19th day of October, 1999, New Orleans, Louisiana.

S/ PATRICK H. HUFFT
NOTARY PUBLIC